

IN THE COURT OF COMMON PLEAS  
BUTLER COUNTY, OHIO  
CRIMINAL DIVISION

THE STATE OF OHIO,

Plaintiff

vs.

GUY BILLY LEE SCOTT,

Defendant

FILED In Common Pleas Case No. CR91-11-0947  
BUTLER COUNTY OHIO

SEP 30 1996

MARK SALTER  
CLERK

PLAINTIFF'S ANSWER TO  
DEFENDANT'S PETITION TO VACATE  
JUDGMENT AND SENTENCE  
AND FOR POST-CONVICTION RELIEF

Now comes the State of Ohio, by and through the Prosecuting Attorney and for answer to the Petition of the Defendant filed herein, states as follows:

Response to Petitioner's First and Second Grounds for Relief

Due to the fact that the first and second grounds for relief relied upon by petitioner are so closely intertwined, the State will consolidate those grounds for purposes of this answer.

Petitioner alleges that the indictment against him was based on perjured testimony offered by Gary Heath. To prove that assertion, he attaches a transcript of his investigator's interview with Gary Heath. The transcript of the interview does not indicate that the defense investigator's statement was taken under oath. Heath's Grand Jury testimony was taken under oath.

When one statement has been taken under oath and a second statement not under oath is secured which contradicts the first statement, this is not proof of perjury. State v. Goodin (1978), 56 Ohio St. 438.

However, it is argued that Petitioner's counsel was ineffective because he did not file a motion to dismiss the grand jury indictment on the basis that it was secured by the use of perjured testimony. The State would submit that there is no proof of perjury upon which to file such a motion when the second statement (upon which Petitioner now relies) was never taken under oath. If there is no proof of perjury upon which to base the motion, then there would have been no basis upon which to file a motion to dismiss on that ground and failure to do so cannot

constitute ineffective assistance of counsel.

Furthermore, it should be pointed out that Mr. Reinhart's opinion is predicated upon the assumption that what Gary Heath told the defense investigator is in fact true. Paragraph ten of his affidavit is the operative paragraph for the basis of his opinion and in that paragraph, he admits that his opinion is based on that proposition. The only way for petitioner to prove that what Heath says in the unsworn statement is in fact true (without admissions from those allegedly involved) would be to submit a sworn affidavit from Heath with his petition that he did, in fact, commit perjury at the Grand Jury. That has not been done. In response to the allegation that perjury was suborned, the State of Ohio would submit with this answer a sworn affidavit from David A. Lindloff, attached hereto and marked as Exhibit A.

It should be noted that Mr. Reinhart's opinion as to ineffective assistance of counsel is very narrowly drafted. He does not venture an opinion as to whether it could be ineffective assistance of counsel if in fact what Gary Heath said in the statement to the defense investigator is untrue. In such an instance, the State submits that what is left unsaid is as important as what is said, because the implication is that it would not be ineffective assistance of counsel if what Heath says is false.

Petitioner's counsel filed pre-trial motions regarding the issue of Heath's grand jury testimony, which resulted in an order by this Honorable Court to have said testimony transcribed and delivered to the Court. Had Heath actually testified at trial, the grand jury testimony to potentially impeach him was ready and waiting.

Counsel for petitioner has offered no case law to back up his assertion that if perjured testimony is offered at a Grand Jury proceeding, the remedy for that is dismissal of the indictment. Nor has he offered any law that indicates that an indictment can be considered void or voidable on that basis. The State of Ohio has found no such law or case law.

Finally, it should be pointed out that Gary Heath did not testify at the trial of this matter. However, Guy Billy Lee Scott was convicted without such testimony being offered. The burden of proof at trial is that of proof beyond a reasonable doubt. This is much greater than the burden of proof at a grand jury proceeding, where the duty of the grand jurors is to ascertain whether there is probable cause to believe that a potential defendant has committed a crime and make a determination that the case should proceed to trial. Petitioner's expert witness states in his affidavit that the only remedy is dismissal of the case before trial and resubmission of the case to the grand jury absent the perjured testimony. Since the greater burden of proof was sustained at trial without the alleged perjured testimony having been offered, then it becomes apparent that the state had more than sufficient evidence at the grand jury stage to secure the indictment, even without Gary Heath's testimony.

Mr. Reinhart has very good credentials, which the State does not dispute. However, Mr. Reinhart did not have the opportunity to talk with Gary Heath; Mr. Hobbs did. Mr. Hobbs was in the position of being able to make the necessary credibility assessments with respect to the statement that Heath offered to the defense investigator. Mr. Reinhart is not in that position - he

can only proceed on the bare document attached to the petition.

Mr. Hobbs was in a position to present Heath's testimony to the jury which ultimately decided Petitioner's fate. Mr. Hobbs chose not to do that. As the record of this case clearly indicates, Mr. Hobbs did a good job in representing his client both before and during the trial. Clearly, there was trial strategy involved in the decision whether to present Heath's testimony or not at the trial of this matter. Simply because Mr. Hobbs elected not to put Heath on the stand or file motions to have the indictment dismissed, based on Heath's statement to his investigator, does not automatically mean that his performance as counsel was ineffective. To make that statement is pure speculation; the quality of the source of the information must be taken into account when determining how to proceed during trial.

For all the above reasons, as well as the statements set forth in response to the first grounds for relief, the State of Ohio submits that this basis for relief is without merit.

#### Response to Petitioner's Third Ground for Relief

As is the case with the preceding grounds for relief, this ground has been dealt with on direct appeal.

Tony Young was not a stepson or step nephew of the decedent Ricky Stoner. That has been made clear from the record in this case. His mother had a relationship with Stoner. The defense investigators did discover that. The State made no effort to hide that fact. The state was under no obligation to inform the defense of that fact. The excerpt of the interview with Young attached to the petition shows simply that the State did not want Young's address revealed when he was interviewed; the interview was lengthy and thorough otherwise. Considering the nature of his testimony, it would have been folly to reveal his address, thereby opening him to pre-trial harassment. Young was cross-examined at length during the trial. His credibility was ferociously attacked.

Under such circumstances, it cannot be said that Petitioner was denied the effective assistance of counsel nor was he denied a fundamentally fair trial. His convictions are not void or voidable and this ground for relief is without merit.

#### Response to Petitioner's Fourth Ground for Relief

The issue of whether the sentence enhancement was proper is an issue that was raised in the direct appeal of this case. The Court of Appeals determined that the sentence enhancement was not unconstitutional, stating:

...[T]he plain language of R.C. 2929.11 refutes appellant's argument. R.C. 2929.11 (B)(1)(b) provides that "[i]f the offender has previously been convicted\*\*\*of any aggravated felony\*\*\*or murder\*\*\*then the minimum term of actual incarceration [is] \*\*\*fifteen years and the maximum term shall be twenty-five years." In this case, appellant's

conviction for voluntary manslaughter preceded his conviction and sentencing for rape. Thus the trial court was correct in enhancing appellant's sentence based on the prior conviction specification.

Once more, it should be noted that Petitioner offers no Ohio case law in support of his contention that the sentence enhancement was unconstitutional. Therefore, his argument that the sentence is void or voidable is without merit. The Supreme Court of Ohio declined to review this case and this alleged error.

#### Response to Petitioner's Fifth Ground for Relief

The issue of whether or not there was sufficient evidence to prove rape, and the insertion of a penis into the victim's anus, was likewise dealt with on the direct appeal of this case. The Court of Appeals held that in light of all the testimony and evidence, there was more than sufficient evidence to support the jury's judgment of conviction for this charge.

#### Response to Petitioner's Sixth Ground for Relief

Lesa Buckley did die of drowning. The evidence showed that she had to have been beaten unconscious and dragged along the ground after she had been rendered unconscious. The evidence also proved that an unconscious person placed in the water, face down, will not be immediately revived by the water, but in fact will continue to breathe in and out normally, thus drowning. An unconscious person does not drag themselves along the ground, feet first. An unconscious person does not lie face down in a lake and continue to lie there until they drown. It was clear from the severity of the injuries that Lesa Buckley received that she had been placed in the lake, while unconscious, with criminal intent.

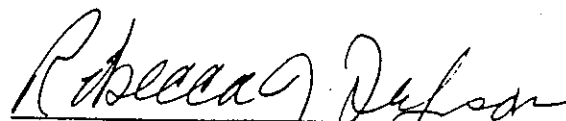
This issue has also been litigated on direct appeal to the Court of Appeals and that Court held that all the evidence adduced at the trial of this matter was in fact sufficient to prove that Lesa Buckley was intentionally killed. The due process clause has not been offended.

It is clear from the record of this case that Petitioner Guy Billy Lee Scott's conviction and sentence are not void or voidable under the Constitution of the State of Ohio and the Constitution of the United States. That being the case, there are no grounds for this Honorable Court to vacate the judgment and sentence imposed in this case. Every ground for relief relied upon by the petitioner in this case has already been litigated on the direct appeal of the matter and every single ground cited by petitioner has already been decided against him. The petitioner has only rehashed issues already raised and decided by this Honorable Court and by the Court of Appeals. As the Supreme Court declined to accept this case for review, it is clear that the issues are *res judicata* and this Court should so find.

Wherefore, the State of Ohio moves the Court to find that there are no substantive grounds for relief in this case, file its findings of fact and conclusions of law, and enter judgment

denying relief on the petition.

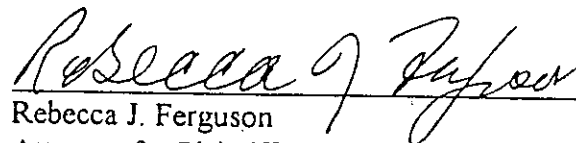
Respectfully submitted,



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Certificate of Service:

The undersigned hereby certifies that a copy of the foregoing Answer to Pétition to Vacate Judgment and Sentence and for Post-Conviction Relief Pursuant to R.C. 2953.21 was mailed to Mr. H. Fred Hoefle, Attorney for Defendant, 4400 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202-3016, via ordinary U.S. Mail, postage prepaid, this 30<sup>th</sup> day of September, 1996, at Eaton, Ohio.



Rebecca J. Ferguson  
Attorney for Plaintiff